No. 88.

Reply Brief of Cist

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OCTOBER TERM, 1898.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY

versus

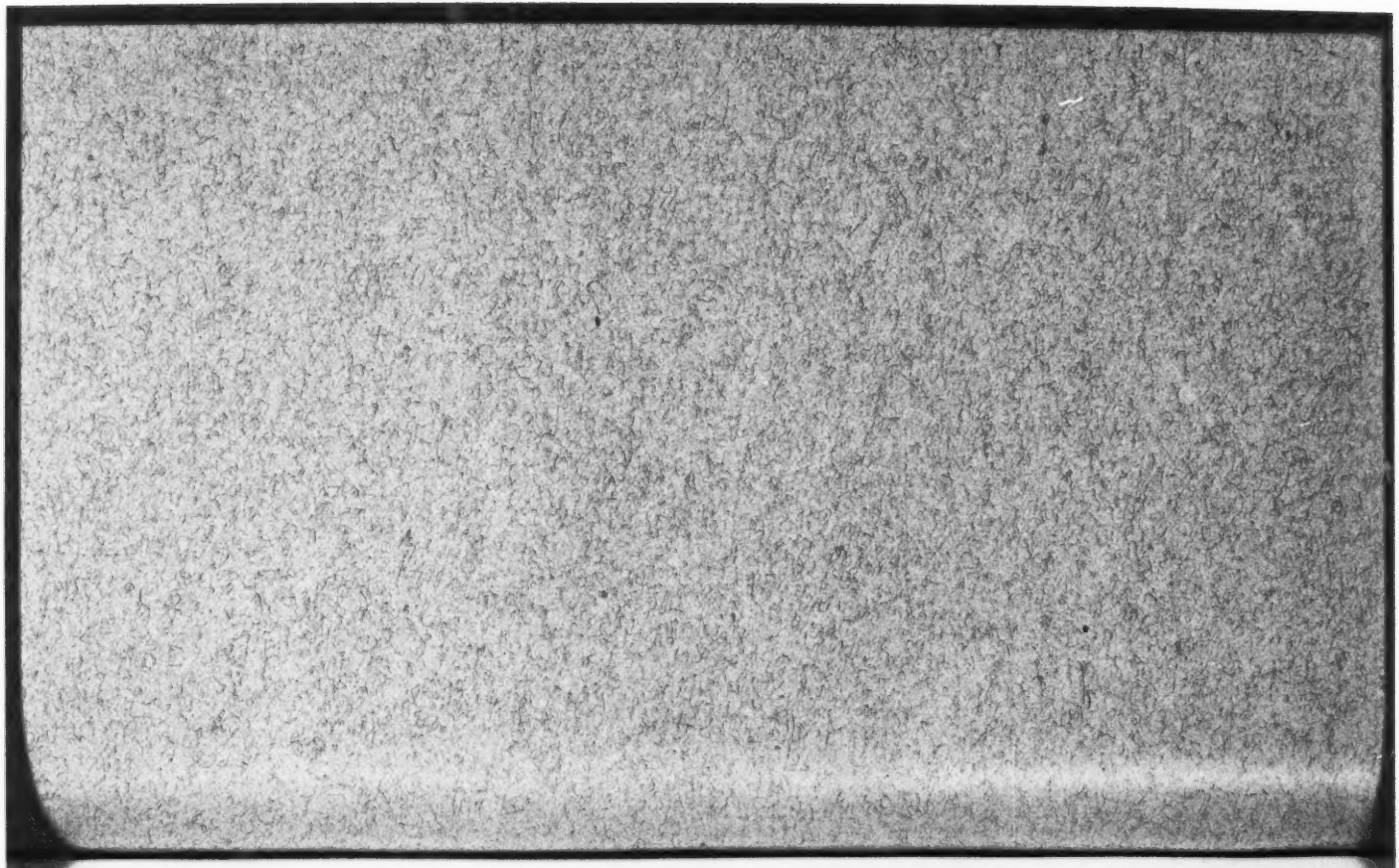
WILLIAM VOIGHT.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Reply Brief for Defendant in Error.

CHARLES M. CIST,
Attorney for Defendant in Error.

THE COURT INDEX PRESS.



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THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

No. 88. *vs.*

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The inquiry in the case is as to the relation of an express messenger to the railroad company which transports him under a contract of release.

It is clear from all the authorities and is conceded by counsel for plaintiff in error (Reply Brief, pp. 2, 3 and 5) that in the absence of any contract releasing the railroad company from liability for negligently injuring him, the messenger would be carried by the railroad company as an ordinary passenger for hire of a common or public carrier, and that the law would impose upon the railroad company the duty of exercising the highest degree of care for his safety.

The only difference that counsel can suggest between a postal clerk, who is recognized everywhere as a passenger for hire of a common carrier, and an express messenger, who fre-

quently occupies a part of the same car as a postal clerk, is that the postal clerk has executed no release to the railroad company (Reply Brief, p. 5).

It is established by the decisions of this Court that a contract releasing a common carrier, especially a railroad company chartered as a common carrier, from liability for negligently injuring one who travels as its passenger for hire is nugatory and void. *Hartford Ins. Co.* v. *Ry. Co.* (not yet reported); *Ry. Co.* v. *Stevens*, 95 U. S., 655; *R. R. Co.* v. *Lockwood*, 17 Wall., 357.

The claim is nevertheless made in the case at bar that the contract releasing the railroad company from liability for negligently injuring one, who, but for such contract, would have been its passenger for hire is not nugatory and void, but has the effect of cancelling the relation of the express messenger to it as its ordinary passenger for hire so that it becomes competent to enter into such contract relieving it from the duty imposed by law of exercising due care to carry the messenger safely.

This reasoning was expressly disapproved in *R. R.* v. *Lockwood*, 17 Wall., 357. The Court say, at page 373:

"It is argued that a common carrier by entering into a special contract with a party for the carriage of goods or persons on modified terms drops his character and therefore may make any contract he pleases—that is, he may make any contract whatever, because he is an ordinary bailee, and is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning."

And on page 383:

"The law fixes the degree of care and diligence due from the railroad company to persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care or diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

So also in *Bank of Kentucky* v. *Express Co.*, 93 U. S., 180, the Court say:

"We have already remarked, the defendants were common carriers. They were not the less such because they had stipulated

for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, *not by the contract they made respecting the liabilities which should attend it.* Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

In the case at bar, by the nature of its business the railroad company was a carrier of passengers, and its liability to a passenger who traveled as a messenger for an express company is not determined by the contract it made respecting the liability which should attend the carriage.

See, also, opinion of the Circuit Court in this case, which we print as an appendix hereto.

I.

The Expressman's Right to Travel by Public Conqeyances.

An expressman, traveling as such, may not be refused passage by a common carrier, if he require no accommodation or facilities on the carrier's vehicle greater than or different from ordinary passengers. Such an expressman could not be denied access to a street car, an electric car, an omnibus, a railroad train or other public conveyance so long as he sought no greater privileges than other passengers. His *status* under those circumstances is obviously that of a passenger for hire of a common carrier indistinguishable in character and rights from an ordinary passenger. Then when the expansion of his business requires, for the mutual convenience of himself and the railroad company, that he shall have an extra amount of space on the train, or be put into a separate car, his relation to the railroad company does not differ from that of a drover who might travel in a passenger car, but the demands of whose business require, for the mutual convenience of himself and the railroad company, that he shall have an extra amount of space and shall travel in a special car not provided for passengers. While the railroad company may not be obliged to yield to an expressman or a drover special facilities upon the train, yet the fact that the carrier yields facilities which it might refuse does not make it a private carrier (*Hanni-*

bal R. R. v. *Swift*, 12 Wall, 262). Therefore it can not, as the price of such facilities, or at any price, purchase exemption from liability for negligently injuring one who, although such special facilities on such terms are conceded, is its passenger for hire.

Counsel for plaintiff in error insists that an express messenger is not entitled as a matter of right to occupy a special car, and therefore, the carrier having the right to refuse him the special car, has the right to exclude him from the train, and therefore, not being under any duty to carry him may, in consenting to do so, impose the stipulation for release.

The vice in this reasoning is that it confuses the distinction between the right of the messenger to access to the train which is his by law and his right to special accommodations on the train which he must acquire by contract.

This distinction between the right of a person to be admitted by a common carrier as a passenger and the right of the carrier to refuse him special accommodations on the vehicle is recognized in *Hall* v. *DeCuir*, 95 U. S., p. 501, where the Court say :

"Corresponding views are expressed by the Supreme Court of Michigan in an analogous case in which the distinction between the right of an applicant to be admitted on board and his claim to what part of the vessel he shall occupy, is clearly pointed out. Referring to that subject the Court say the right to be carried is one thing and the privilege of a passenger on board as to what part of the vessel may be occupied by him is another and a very different thing ; and they add that it is the latter and not the former which is subject to reasonable rules and regulations and is, where such rules and regulations exist, to be determined by the proprietors."

And the right of the carrier to exact a contract for special facilities does not include the power to impose an unreasonable condition upon the messenger's right to travel as a passenger.

So in the case at bar the right of the express messenger to be carried as a passenger is one thing and is not affected by the right of the carrier to refuse him special facilities or accommodations on its vehicle. Therefore if the railroad company sees fit to accord him such special accommodations, the messenger in accepting the same does not cease to be its passenger for hire even though the railroad company seek to divest him of that character

by exacting a release as the price of such special accommodation.

And again, at p. 503 :

"The law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal, but the passenger is not entitled to any particular apartments or *special accommodations.*"

And if the carrier sees fit to provide special accommodations it can not, as the price, stipulate for a release. That was settled in the Lockwood case. The carrier could have refused Lockwood passage on the freight train, sending one of its own employes with the cattle, and requiring Lockwood to ride on its passenger train. But when it did accord him the special facilities on a car not intended for passengers, it could not, as the price, stipulate for exemption from liability for negligently injuring him.

A public carrier may have the right to refuse to carry, but if, having such right to refuse, it accepts the persons or merchandise, it must do so as a common carrier.

This was determined in the case of *Hannibal Railroad* v. *Swift*, 12 Wall., 262. The syllabus reads :

"2. If a common carrier of passengers and of goods and merchandise have reasonable ground for refusing to receive and carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground if desirous of avoiding responsibility. If not thus insisting he receives the passengers and their baggage and other property, his liability is the same as though no ground for refusal existed.

"3. The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the carriage in which it is transported, or the fact that the carriage is loaded by the owner.

"4. It is not a ground for limiting the responsibility of a common carrier, where no interference is attempted with his control of the property carried, that the owner of the property accompanies it and keeps watch for its safety."

Counsel's argument may be thus stated :

The express messenger derives his right to be carried and his right to use the express car solely by virtue of the contract between the express company and the railroad company. The railroad company not being obliged as a common carrier to furnish special facilities to the express company may, in making the contract to

carry the express messenger, stipulate for a release from liability for negligently injuring him while being carried.

When analyzed this will be found to be reasoning in a circle.

Counsel's first position is: "The express messenger is not an ordinary passenger for hire because he travels in a special car." The answer is that in providing the express messenger with special or different accommodations from an ordinary passenger the railroad company does no more than it does for every stock drover whom it permits to ride on its freight trains, and therefore the messenger, so far as the special car is concerned, is no less a passenger than is the stock drover.

Counsel reply: "But a stock drover is on the freight train by virtue of a common carrier's contract for shipment of his cattle, while an express messenger is on the train by virtue of a private contract."

The response is that, if a person is traveling on the freight train for compensation accepted by the railroad company, it is of no importance whether he is there as a stock drover or in connection with the shipment of any freight; the fact that the company accepted compensation for his passage on that train makes him its passenger for hire although it might have refused him carriage on its freight train.

Thereupon, counsel return: "But in such case he is a passenger for fare paid and received while the express messenger is on the train by virtue of a contract with the express company which the railroad company was not obliged to make and did not make as a common carrier."

The answer is: "The messenger's fare is included in the general compensation paid by the express company to the railroad company, and the fact that the railroad company carried him as an incident to a private contract into which it was not obliged to enter, does not signify. If it had made a contract with a telegraph company to carry their electrician to keep the wires in order without other fare than the rent of right of way and station facilities, the fact that it was not bound to enter into that contract does not alter the relation of the electrician to it as the passenger for hire of a common carrier."

"But," counsel urge, "the electrician travels in an ordinary

passenger car, he does not require and is not carried in a separate car not intended for passengers."

With this the circle is complete, and we get back to the original proposition that the fact that the messenger rides in a special car or special part of the train alters his relation to the railroad company. We have seen that it does not; that no matter how or where the railroad company, by reason of the exigencies of its business, puts the passenger, it is bound to the same duty of care for his safety, and can not put off or "contract itself out of" the duty.

As this Court held in the Lockwood case, it is against the policy of the law to permit a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants, and that this applies with especial force to the carriers of passengers for hire.

It will be observed that the Court place the invalidity of the stipulation upon the ground that Lockwood was a passenger for hire—not that his passage was an incident to the common carriers' contract for shipment of the cattle. It was as a passenger for hire, irrespective of the occasion which led to his taking passage, that his release was invalid.

II.

The Special Car.

It may be well to point out the further reasons why an express messenger's rights as a passenger ought not to be determined from the fact that in the case at bar he occupied a car not used by passengers, but set apart by the railroad company for the express and postal business, for this is a mere adventitious circumstance, and in no sense a characteristic of the business or an essential element in the relations of the parties. Many express messengers travel on steamboats, and merely occupy a separate stateroom, as do other passengers; many travel in a compartment of a regular passenger coach; many, when the business of the route is inconsiderable, occupy an ordinary seat in the regular passenger coach, with their packages within reach. It could hardly be said that their relation to the railroad com-

pany varied with their location on the train; for that would be to hold the release void on one day when the messenger traveled in a passenger car, and valid on another when he might occupy the baggage or express car.

And in the changing conditions of transportation the electric lines are beginning to be used for express business, affording as they do, speedy and frequent access to the country surrounding every large city, and in many instances from city to city. No special cars are needed for the transaction of an express business over such lines. The trips are so numerous and so cheap that on no one car does the messenger require more space than is accorded to the residents along the line for their parcels. Yet the relations of the messenger as passenger of the carrier are the same as if the space he required for the packages he carries was much greater. In fact, if the contention of our adversaries is correct, any street car or omnibus company may refuse to carry an express messenger on his way to the train unless and until he should sign a contract exempting it from liability for negligence.

Frequently express messengers on their return trip travel without packages and ride wherever they choose on the train. Their right to ride is secured by the same contract that covers transportation of express matter, and in every respect their relation to the carrier on the journey is the same as if they rode in an express car. Are we to understand that counsel would contend that if in the case at bar the messenger had been so returning and was riding in the passenger car the contract for immunity in negligently injuring him would be valid? And yet if counsel does not so contend, he fails to point out any substantial ground upon which to rest a distinction.

Moreover, it is well settled that the fact that one travels in a special car, or a car not intended for ordinary passengers, does not alter his relation to the railroad company as the passenger for hire of a common carrier.

A drover, accompanying cattle, travels in a car on a train not intended for passengers. Yet he is a passenger for hire of a common carrier. *Horst* v. *Ry. Co.*, 93 U. S., 291; *R. R.* v. *Lockwood*, 17 Wall., 357.

In the Horst case the Court say, p. 295:

"A person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes."

"Such is the rule of care and diligence laid down by this Court in three adjudications where the action was against a carrier of persons. The first was *The Philadelphia & Reading R. R. Co.* v. *Derby*, 14 How., 486. The plaintiff was travelling gratuitously on a passenger train. It was said: 'Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.' . . . . "Any negligence in such case may well deserve the highest epithet of gross.' The next was *The Steamboat New World* v. *King*, 16 How., 469. That was the case of a free passenger carried on a steamer, and injured by the explosion of a boiler. Referring to the rule laid down in the prior case, the Court said: 'We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law.' The last case was *The New York Central R. R. Co.* v. *Lockwood*, 17 Wall., 357. That was a case, like this, of a passenger accompanying his cattle on a freight train. It was there said: 'The highest degree of carefulness and diligence is expressly exacted.' This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in this case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe on one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it."

In the leading case of *R. R.* v. *Derby*, 14 How., 293, the injured man was riding on the locomotive. Yet he was held a passenger of a common carrier entitled to the highest degree of care.

Many persons travel by rail in private cars, owned by them or rented to them by the railroad companies or lent them by private owners. The railroad companies in whose trains these cars are

transported receive pay therefor. But no one has ever been heard to assert that if a railroad company accepts pay for transporting persons in such a private car a release may be taken from liability for its negligence.

The special car, therefore, being a mere circumstance, an "accident of his situation," as it is styled in *Ry.* v. *Derby*, 14 How., 293, without legal significance or consequence in this case it will be seen that the relations of the express messenger and the railroad company in the case at bar, and those of the inventor and the railroad company in the case of *Ry. Co.* v. *Stevens*, 95 U. S., 655, where the stipulation for release was held void, are precisely the same. There is no distinction that we can discern. In both cases the railroad company could have declined to make the particular contract to which the passengers' journey was incidental.

In both cases the railroad company expressed its unwillingness to accept the person as an ordinary passenger for hire by exacting a release from liability for negligence and in no other way.

III.

Railroad Company the Common Carrier of the Messenger.

Counsel persistently confuses the relations of the parties to these contracts. He says: The railroad company is not a common carrier of express companies; therefore it is not a common carrier of the express matter; therefore it is not a common carrier of the messenger.

There is no such legal or logical connection between these propositions. It may be true that the railroad company is not a common carrier of express companies. It is not true, nor does it follow, that it is not a common carrier of the express matter, as we shall presently show. But even if it were true that the railroad company is not a common carrier of the express matter, for the reason assigned by counsel, that because the express company is a common carrier of the express matter, and there can be but one common carrier's liability, yet it is inconsequent to the point of absurdity to say that *therefore* the railroad company is

not the common carrier of the messenger. Even if it were true that, as to the goods, public policy is satisfied with the single liability of the express company as common carrier of the goods, yet the express company is *not* the common carrier of the messenger, and is under no liability at all to him. The express company is not a common carrier of passengers. The express messenger is like anybody else's messenger—an employe whose fare is paid on the public conveyances by which he is obliged, from the nature of his mission, to travel. The railroad company is the only common carrier of the messenger. The express company merely pays the messenger's fare on the passenger train in order that he may accompany the parcels for their greater safety and transact at destination such other business as his employer may have entrusted to him. If, fearing a robbery, the express company had employed a detective to travel on the passenger train in the smoking car with other passengers, the relation of such a detective to the railroad company as its passenger would be the same as that of the express messenger whom he reinforces, except for the casual nature of his employment. The very nature of the express business requires that the property be carried on passenger trains in charge of a messenger and such guards from time to time as will insure its safety. *Holliday* v. *Kennard*, 12 Wall., 258. It would be negligence on the part of the express company not to send extra guards, if need were, and the railroad company could not refuse to carry them any more than it could refuse any other passengers. Nor if it exacted a release would the release be valid.

In *Bank* v. *Express Co.*, 93 U. S., p. 177, the Court thus describes the express business:

"The defendants are express companies engaged in the business of carrying for hire money, goods and parcels from one locality to another. In the transaction of their business, they employ the railroads, steamboats and *other public conveyances of the country*. These conveyances are not owned by them, nor are they subject to their control any more than they are to the control of *other transporters or passengers*. The packages entrusted to their care are at all times when on these public conveyances in the charge of one of their own messengers or agents."

IV. .

The Railroad Company the Common Carrier of the Express Freight.

The law appears to be, however, that while the express company is a common carrier of the parcels for the shipper, and while the railroad company is a subordinate carrier for the express company, yet the railroad company is liable to the shipper as a common carrier for loss of the goods carried for the express company, even where the railroad company and the express company agree that the express company shall be solely liable, of which agreement the shipper is notified.

In *New Jersey Steam. Co.* v. *Merchants Bank*, 6 How., 343, the steamboat company was sued for loss of specie which it was carrying for an express company under such an agreement. The Court say, p. 382:

"The next question is as to the duties and liabilities of the respondents as carriers. . . . . The general liability of the carrier independently of an agreement is familiar. He is chargeable as an insurer of the goods. . . . . The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

"The question is, to what extent has the agreement qualified the common law liability.

"We lay out of the case the notices published by the respondents seeking to limit their responsibility because—

"1. The carrier can not in this way exonerate himself from duties which the law has annexed to his employment; and,

"2. The special agreement with Harnden is quite as comprehensive in restricting their obligation as any of the published notices."

The Court proceed throughout on the theory that the steamboat company in carrying out its contract for the expressman was liable to the owner of the goods as a common carrier. They say, p. 725:

"The last case (*Sanderson* v. *Lamberton*, 6 Binney, 129) is like the one before us. It was an action by the owners directly upon the sub-contract made by the first with the second carrier in whose hands they were lost."

Sanderson v. *Lamberton* was a case where the first of two connecting carriers had delivered to the second carrier certain goods

for the transportation of which through to their destination the first carrier had contracted with the shipper. The relation of a railroad company to express freight carried on its line is, therefore, not analogous merely, but identical with its relation as a connecting carrier to freight carried on its line for which an initial railroad carrier has issued a through bill of lading. As such connecting carrier it is liable to the shipper as a common carrier of the goods, although it is not a common carrier of the initial line, nor compellable at common law as a common carrier to participate, in the capacity of a subordinate or sub-contractor to the initial carrier, in carrying such through shipment.

In this early case the judgment of this Court was that the carrier employed by the express company was liable as a common carrier tothe owner of the goods, who had delivered them to the express company for carriage to destination, and this strikes at the very root of counsel's contention (Brief, p. 19) that because the railroad company in the case at bar was not a common carrier of express companies, that it was therefore not a common carrier of the goods handled for the express company, and that the messenger was not its passenger.

The railroad company is not a subordinate carrier of the express messenger. It is the sole carrier of the messenger. The express company carries the goods, but it does not carry the messenger. It pays the fare of the messenger on the passenger train, and the messenger occupies that part of the train in which the railroad company, for the mutual convenience of itself and the express company, sees fit to place him. Sometimes the railroad company places the messenger in the regular passenger coach, sometimes in a "combination" car devoted partly to passengers and partly to baggage, sometimes in a part of the mail or postal car, and sometimes when the magnitude of the business justifies the additional space, the messenger, still in charge of the parcels, occupies an express car set apart for that business. But his relation to the railroad company does not change with the amount of space accorded him on the train. When Harnden inaugurated the business and in person carried the bank drafts, parcels and specie in a satchel, traveling on a steamboat or railroad

train without requiring more space than any other passenger occupied, the relations of the messenger to the goods carried and to the public carrier by whose vehicle he engaged transportation were created and arose. These relations remained the same when the parcels became larger and the space allotted by the railroad company for his accommodation was increased to correspond.

It is thus seen that the considerations which counsel urge as determining the relation of the railroad company to the express *messenger* are only pertinent to the relations between the railroad company and the express *company*. The real question is not as in the *Express Cases*, whether the railroad company can be compelled to enter into a contract to furnish special facilities to an express company, but whether in making such a contract, the right to personal safety of a messenger carried for hire as an incident to such contract may be bargained away, so as to deprive the messenger of redress if he be injured by negligence of the railroad company. The solution of this question neither depends upon nor is aided by a consideration of the relation of the railroad company to one of several competing express companies. If as a consequence of that relation the railroad company undertakes to carry a passenger for hire the status and rights of the passenger for hire are fixed not by the contract but by the rules of law.

V.

The Express Cases.

If the above deductions are sound, it will be unnecessary to discuss the question whether the express business is a public duty which railroad companies are bound to perform; which was strongly intimated by this Court in the *Express Cases*, 117 U. S., 1, but as the argument of counsel is based upon an erroneous conception of the decision of this Court in the *Express Cases*, which error finds expression also in the case cited by him, *Ry.* v. *Keefer*, 146 Ind., 21, we submit a review of that decision.

The *Express Cases* constitute one of a group of three in each of which the *ratio decidendi* is the same. These three cases are:

Atchison Ry. Co. v. *Denver Ry. Co.*, 110 U. S., 673.
Pullman Co. v. *Mo. Pac. Ry. Co.*, 115 U. S., 587.
The Express Cases, 117 U. S., 1.

In each case of this series the aid of a court of equity was sought to compel a railroad company to enter into business relations with the complainant on the ground that there was a public duty resting upon the railroad company to do that kind of business. The Court refused. Without questioning the duty of the railroad company to the public to do such business, the Court held that it was of no importance to the public by what agency the railroad company performed the duty.

In the first case, *Atchison Ry. Co.* v. *Denver Ry. Co.*,

"The general purpose of the suit was to compel the Atchison, Topeka & Santa Fe Company to unite at Pueblo with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road with the same privilege as to exchange of business, division of rates, sale of tickets, issue of bills of lading and interchange of cars that were or might be customary with connecting roads or that were or might be granted to the Denver & Rio Grande Railroad Company, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo or to any other railroad competing with the Denver & New Orleans for Denver business."

The Court say (foot p. 682) that to hold under these circumstances the Denver & New Orleans Company was entitled to the relief sought

"would be in effect to declare that every railroad company which forces a connection of its road with that of another has a right to require the company with which it so connects to do a connecting business at the junction if it does a similar business with another company under any other circumstances,"

which the Court held was not the law.

This decision recognized the rule that a railway company, although a common carrier of goods and passengers, could not be compelled to extend to all connecting carriers the same facilities on the same terms. If the railroad company, in discharging its public duty as a common carrier, saw fit to employ or be employed by one agency rather than another in doing a through business, it might do so to the exclusion of other common carrier agencies. But it is manifest that this privilege of declining to render through service for a common carrier is no measure of its right to stipulate for immunity from liability for negligently

injuring the freight or persons that, in pursuance of such arrangement for through shipment, are actually carried by the railroad company. It would be no answer to a suit by a shipper for loss of his goods, or to a drover for personal injury, for a railroad company to say that as it was not obliged to carry him for the initial carrier, which had contracted for his transportation, it had the right, if it did consent to carry him, to stipulate for a release from liability for negligence. Such contention was made and repudiated in *Ry. Co.* v. *Ashley*, 67 Fed., 209; 28 U. S. App., 375.

The next case was that of *Pullman Co.* v. *Ry. Co.*, 115 U. S., 587. The Pullman company invoked the chancery powers of the Court to compel the railway company to haul Pullman sleeping cars. One ground urged was—

"That it has become indispensable in the conduct of the business of a railroad company to run on passenger trains, sleeping and drawing room cars with the conveniences usually afforded by such cars for night travel."

The Court said:

"This may be true, but it by no means follows that the railway company is in law obliged to arrange with the Pullman company for such accommodations."

The ruling is on the same ground as in the Atchison case—that while it may be the duty of the railway company to haul cars for the public accommodation, yet it is under no duty to elect one agency rather than another through which to perform such public duty.

Here again it is manifest that the right of a railroad company to refuse to haul Pullman sleepers is no measure of its right to stipulate for release from liability for negligently injuring a person carried on the Pullman car, whether such person be the president, traveling auditor, detective or other employe of the Pullman company whose right to travel free on the car might grow out of the contract between the railroad company and the Pullman Company.

The next in series was the *Express Cases*, 117 U. S., 1. In each of these the aid of a court of equity was sought by express companies to compel a railroad company to furnish facilities on

its trains and do an express business with them on the same terms and in the same way that the railroad company "accorded to any other company engaged in conducting an express business on its line."

The Court said that this would be to make (p. 29):

"An arrangement for the business intercourse of these companies such as, in the opinion of the Court, they ought to have made for themselves, and that as was said, in *Atchison Ry. Co.* v. *Denver Ry. Co.*, 110 U. S., 667, followed at this term in *Pullman Palace Car Co.* v. *Missouri Pac. Ry. Co.*, 115 U. S., 587, could not be done."

To the misapprehension of the question decided in the *Express Cases* is due much of the error that appears in the decisions relied on by our adversaries as authorities. The *Express Cases* recognize to the fullest extent the public duty of a railroad company as a common carrier to do or permit to be done an express business over its line, but hold that this duty is performed when a railroad company furnishes to one express company, even to the exclusion of others, the necessary facilities for such express business. There is in the *Express Cases* no negation, express or implied, but rather a recognition of the truth of the proposition that the railroad company is a common carrier of the express packages and of the passenger who accompanies them. The negation in the *Express Cases* goes merely to the proposition that the railroad company is a common carrier of *express companies* as well as of express matter and messengers. The Court intimate that the railroad company is not a common carrier of common carriers, but it is as erroneous to infer therefrom that the railroad company is not a common carrier of the goods and persons accompanying them as it would be to infer from the Atchison case that a railroad company which receives from an initial carrier a car containing a through shipment of stock with a drover in charge was not a common carrier of the car load of stock and the man in charge.

And it would seem manifestly absurd to say that if the drover in charge of the cattle tendered by the initial carrier were an employe of the initial carrier the release would be valid, while if he were an employe of the owner of the stock the release would be void. Yet such is the effect of the argument pressed by counsel for plaintiff in error.

It is, therefore, a *non sequitur* to argue that because the railroad company is not compellable to enter into business relations with an express company it may attach to its consent to do such business a stipulation that the messenger shall be carried without liability for negligently injuring him. The duty to enter into contractual relations with the express company is no measure of the duty of the railroad company to safely carry a messenger or other employe whose fare is included in the contract price.

That this is true is shown by the reasoning of the Court in *Ry. Co.* v. *Stevens*, 95 U. S., 655, where as an incident to a proposed contract for the use of a patented car-coupling, the inventor was given passage on the company's train under an express stipulation that the acceptance of such transportation should impose no liability on the railway company for negligently injuring him. While being so carried as an incident to such private contract he was injured, and the Court held the stipulation against liability for negligence was void.

We submit, therefore, that the ruling of this Court in the "Express Cases" in no way justifies, but, when critically considered, repels the inferences therefrom upon which the decisions cited by counsel are based; and that the duty of the railroad company to competing express companies is no measure of its duty to the owners of the goods or to the messenger, which it carries, or of its duty to the public to carry express matter and messengers.

VI.

The Duty of the Railroad Company to Carry Express Goods and Messengers.

In counsel's reply brief, at page 3, he characterizes as "an admission of the highest importance" the statement in our original brief that the railroad company is not bound to enter into a contract with a particular express company for the carriage of express matter. Counsel entirely mistakes us if he understands the language used by us to concede more than that, railroad company, if it chooses to do the express business itself, may refuse to contract to furnish an express company with special facilities on its trains. We contend, both here

and in our original brief, that this Court, in the *Express Cases*, plainly stated that the railroad company is under a public duty to carry express matter and messengers on its trains, and is therefore *by law* obliged to perform this duty, and we quite agree with learned counsel in saying (Reply Brief, p. 3) that "in such case it would be difficult to see how a railroad company could carry such messenger on any other terms than as a passenger."

To make clear our position, even at the risk of slight repetition, we quote from the *Express Cases* (p. 20) the language of the Court dealing with the obligation of the railroad company to carry express matter and messengers as a public duty imposed by law :

"The express business has become a public necessity, and ranks in importance with the mails and the telegraph. It is used in almost every conceivable way and for almost every conceivable purpose by the people and by the Government."

And on page 21:

"Every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter." . . . .

And on page 24:

"The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

It is clear then, that in carrying express matter and messengers, the railroad company is discharging a public function and a duty to the public as a public or common carrier.

It is as much its duty, so far as the owners of the packages are concerned, to carry these packages in charge of a suitable messenger on its passenger trains as it is to transport freight and passengers.

It operates and was incorporated to operate the public conveyances and the public highway upon which the express business

must be done. Upon these public conveyances the railroad company agrees to transport the express company's messenger for an agreed compensation. It is essential in sending valuable freight by messenger that he shall travel on passenger conveyances in order that, besides guarding the property on the journey, he may also transact the express company's business at destination. The messenger travels precisely as any one might who should be sent by his employer on a journey in charge of valuable property with duties to perform in regard to the property at the point of arrival.

The fact that his employer chances to be an important company, itself doing a common carrier business, does not alter the messenger's relation to the journey or to the property he protects, or to the public carrier by whose conveyance he is transported.

In the inception of this business Harnden, the originator of the enterprise, himself traveled as a public express, carrying the bank drafts, jewelry and other valuable parcels in his satchel. He took passage on whatever conveyance best suited his purpose. And when the frequency and regularity of his journeys necessitated special provision and facilities at a monthly or season rate of compensation, his relation to the transporting companies was still that of a passenger of a common carrier, and there was never any doubt that the railroad company was obliged to carry him.

Counsel (Brief, p. 23) quote Harnden's original advertisement that he would "run a car through from Boston to New York," and intimate that the business was so begun. But we find, on investigation, that this is an error. In his "History of the Express Business," Mr. Stimson, after quoting Harnden's original advertisement in full, states, p. 34:

"The 'extra car' was a little play of fancy, an ordinary valise serving to hold all that the original expressman, Harnden, had to carry for several months afterward. The identical valise is now in the possession of Benjamin P. Cheney, Esq., at Cheney & Co.'s express office in Court Square, Boston. During the first two or three months Harnden served as his own messenger and was upon the Sound nearly every night in the week."

The same statement is made in the Encyc. Brit., Am., Supp., Vol. II, title, "Express," as follows:

"Harnden himself was the messenger and carried his packages at first in a small handbag, afterwards in a stout trunk."

So also with the Wells Fargo Express, founded in 1841 by Henry Wells. Mr. Stimson states, "Hist. Express Business," p. 61:

"Wells acted as his own messenger for about eighteen months. In every instance he paid his fare, and for extra baggage, like any other passenger—say $15.00 from Albany to Buffalo. In 1842 he carried all his valuable parcels in a carpet bag. In 1843 the trips were made daily and one large trunk served to hold all his freight."

The legal relations of the parties have undergone no change since that date. The business has expanded, but its nature has not altered. The seat provided for Harnden or Wells by the railroad company has become a special car, the satchel full of parcels has been superseded by an iron safe, and whatever else of crates or car space the development of the business has made it profitable to devote to the purpose. But always from the beginning until now the essential elements have been that the expressman, as a passenger for hire carrying valuable parcels, is transported on the public passenger conveyances for the sake of speed and security.

VII.

Reasons Given by Counsel why Express Messenger is not a Passenger do not Bear Analysis.

Counsel says (Brief, p. 13):

"The object for which one contracts to use a car is the criterion which determines whether he is or is not a passenger."

Let us apply this criterion: Counsel concedes that a postal clerk is a passenger. The object for which an express messenger uses the car is to accompany and care for valuable property *en route* to its destination, there to do with it what the business requires, cash drafts, make collections, collect charges, etc. The object for which a drover uses a car is identically the same—to accompany and care for the property en route. Yet counsel concedes that a drover as well as a postal clerk is a passenger; so tested by the very criterion that counsel himself sets up, an express messenger is a passenger to the same extent as a postal clerk or a drover.

In his reply brief counsel again attempts to state the reasons why the express messenger is not a passenger. He says (p. 6):

"The reason why the relation of passenger and common carrier did not exist between the messenger and the railroad company is because the messenger had no right upon the train except by the consent of the railroad company, and that because of the purpose for which he desired to be upon the train, a purpose different from that for which the rest of the public desired to use the train and a purpose different from that for which the train was provided."

All of this language and each of these reasons are equally applicable to a postal clerk and a drover, between whom and the railroad company the relation of passenger and common carrier does exist as counsel concedes.

Counsel virtually admits this when (Reply Brief, p. 5) he concedes that the only "distinction between an express messenger and a postal clerk rests in the fact that the express messenger has released the railroad company from all liability;" but on the same page he cites a case, *Commonwealth* v. *Railroad Co.*, 108 Mass., 7, where a popcorn seller on the train was held a passenger of a common carrier, although he had "released the railroad company from all liability" and although he "had no right upon the train except by the consent of the railroad company, and this because of the purpose for which he desired to be upon the train, a purpose different from that for which the rest of the public desired to use the train and a purpose different from that for which the train was provided."

Here at last he finds a case which contains all the crucial elements which, he contends, deprive the person carried of his relation to the common carrier as its passenger, and yet in that case the Court holds that the relation exists.

Counsel also quotes from the *Quimby* case, 150 Mass., 365, in which it was held that a carrier may, in issuing a pass to a free passenger, lawfully exempt itself from liability for negligence, and as it is upon the principle of this case that the Massachusetts Court held later in the Bates and Hosmer cases that the grant of the free privilege of using the baggage car to expressmen who had paid their fare validated the release, we refer to the following cases in which it has been held that stipulations in a free pass against liability for negligence of the railroad company are void.

In the case of *Jacobus* v. *R. R. Co.*, 20 Minn., 125, the Court say (p. 128):

"The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers and holds him liable for the slightest neglect. For like reasons the same extreme care is required, though the passemger be carried gratuitously, having undertaken to carry, the duty arises to carry safely.

"There are two distinct considerations upon which the stringent rule of liability for injuries to passengers rests. One is a regard for the safety of the passengers on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriae*, has in protecting the lives and limbs of its subjects (p. 129).

"So far as the consideration of public policy is concerned, it can not be overridden by any stipulation of parties to the contract of passenger carriage. No stipulation of the parties in disregard of it or involving its sacrifice in any degree can be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same (p. 130).

"It is said, however, that it is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible. In the first place, if this consideration were allowed to prevail it would prove too much, for it could be urged with equal force and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire (p. 130).

"It may be that, on a given occasion, the gratuitous passenger or the passenger upon a free pass is the only person injured, as, for aught that appears, was the fact in this instance, or is the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of the faithful discharge of his duty (p. 131).

"As to the plaintiff being in the baggage car, his presence would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there, under such circumstances, would render it the duty of the company, in view of the fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury" (p. 134).

Counsel says (Brief, p. 6) that our contention would create a new class of passengers—passengers in law or passengers *in in-*

vitum. On the contrary, we are resisting the creation of a new class of passengers, an anomalous class who, because their business requires them to travel for the public, would be without any rights that the railroad companies are bound to respect. As to its employes the railroad company may not contract for immunity in negligently injuring them. As to its ordinary passengers the same disability exists. But the army of express agents who, to the number of ten thousand, travel daily on the various public conveyances of the country are, it is contended, a new class of passengers, whose fare is accepted by the public carriers, but towards whom the carrier has absolved itself from the duty of care for their safety, passengers from whom it has bought the right to be negligent even to manslaughter.

That such messengers are not licensees is shown by the decision of this Court in *Bennett* v. *Ry. Co.*, 102 U. S., 584. The Court say :

" The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

And if counsel's contention is sustained this new class of passengers, to whom the former owes no duty of care, will not be limited to express messengers alone. Already it is a common practice among railroads to require from those numerous persons who travel on freight trains a release from liability for negligence. It may be as plausibly claimed that inasmuch as the carrier has the right to refuse to carry passengers on freight trains such release would be valid. So, also, the multitude of persons who travel in special cars or charter excursion trains may, with equal reason, be deprived of their remedy against negligent injury. So also persons traveling with property shipped by fast freight lines, of which lines there are thirty-one in Cincinnati.

Counsel urges that the consent of the messenger to this contract in some manner gives it validity ; that if he consented to a contract depriving him of his remedy against negligent injury it is against public policy to disregard such consent. To this it is only necessary to say that the power to make a contract is, like all other powers, susceptible of abuse. Against such abuse the

law protects the citizen. A man in distress may not lawfully sell himself into slavery, may not lawfully agree to pay exorbitant usury, may not lawfully agree to refrain from business or marriage or agree to do anything or submit to anything *contra bonos mores* or against the law. He may not, for the sake of employment, agree not to hold his employer liable for negligently injuring him, or for the consequences of a breach of the law by his employer.

In *Coppell* v. *Hall*, 7 Wall., at p. 558, the Court say in reference to a defense that the contract sued on was against public policy:

"In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but for the law itself. The principle is indispensable to its administration. Whenever the illegality appears, the disclosure is fatal. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons."

Counsel closes his brief by insisting "that the railway company stands in the exact relation of one hauling or *towing* an express car."

That this is an erroneous view is shown by the opinion of this Court in *Hannibal Ry. Co.* v. *Swift*, 12 Wall., 262. In that case a car filled with baggage and other property, in charge of a guard for its protection, was hauled by the railroad company in its passenger train. The property was burned while in transit. It was contended that the relation of the railroad company to this shipment was not that of a common carrier.

The Court say, page 272:

"The case of *Mallory* v. *The Tioga Railroad Company*, 39 Barbour, 488, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them, yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The Court did not consider the fact that the property was transported in the cars of the plaintiff, and that the cars were loaded and unloaded by him, affected, in any respect, the liability of the company, the entire train in which the cars were moved being, whilst on the route, under the control and management of its servants and employes.

"In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. . . . . If it were admitted that a special guard was appointed for the car on the route the admission would not aid the company in relieving it of liability. The control and management of the car or of the train, by the servants and employes of the company, were not impeded or interfered with, and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety."

Inasmuch as the question submitted by the Circuit Court of Appeals necessarily brings up for consideration the contracts of release under which the railroad company claims exemption from liability for negligently injuring the express messenger, it is proper to call attention to authorities which hold broadly that no contract or consent whereby one person stipulates for immunity in unlawfully or negligently injuring another is valid.

Public policy forbids one to contract for immunity, whether from civil or criminal liability, in a wrongful act causing death or injury to a human being. Such an act is forbidden by law. The sanctions are the penalties for manslaughter and the liability to civil action for wrongful death or injury. The Federal courts and most of the state courts have uniformly held invalid stipulations for exemption from civil liability for such wrongful act. The safety to human life and limb which the policy of the law aims to secure from wrongful injury is not permitted by the law to be the subject of barter and sale. *Thompson on Negligence*, p. 1035.

In the case of *Railroad* v. *Spangler*, 44 O. S., 471, it was held:

"That the liability of railroad companies for injuries caused their servants by the carelessness of other employes who were placed in authority and control over them is founded upon considerations of public policy, and it is not competent for the railroad company to stipulate with its employes at the time and as a part of their contract of employment that such liability shall not attach to it." See page 478.

In the case of *L. & N. R. R. Co.* v. *Orr*, 91 Ala., 548, the Court say, p. 554:

"Railroads, like other corporations and persons, have the right to adopt reasonable rules and regulations for the government of their employes and for their own protection, but they can not stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon the employe to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroads for negligence, causing injury or death to their employes."

So, also, *R. R. Co.* v. *Jones*, 92 Ala., 218; *Hissong* v. *R. & D. R. R. Co.*, 91 Ala., 514, and *Ry. Co.* v. *Eubanks*, 48 Ark., 460.

In the case of *Johnson* v. *R. R. Co.*, 86 Va., 975, it was held that:

"A contract whereby a party stipulates for exemption from liability for the consequences of his own negligence is against public policy and void."

In this case plaintiff's intestate was a quarryman engaged in getting out rock along a railroad, and while so engaged was struck by a passing train and killed. In the contract with the company, whereby the firm obtained the right to quarry on its premises, it was stipulated that the company should "in no way be held responsible for any injuries to or death of any of the members of the firm or any of its agents or employes should such death or injury occur from any cause whatever. And in the event of suit being brought or any judgment being obtained against the railroad company, then the quarry lessees agreed that they would resist the suit and pay any judgment with costs." The trial court held this stipulation valid. The Supreme Court reversed.

In *Purdy* v. *Ry. Co.*, 125 N. Y., 212, the Court, in touching upon the question, consider the principle of public policy applies to any employer and not solely to railroad corporations.

In *Hartford Ins. Co.* v. *Ry. Co.*, 70 Fed. Rep., 201, the Court enforce the distinction between an injury to property and an injury to person, and show how and why a contract by a railroad company as a carrier for exemption in injuring a passenger, or as an employer for exemption in injuring its employes, is illegal and void, while a contract for immunity for setting fire to a building on the right of way is valid. If the owner chooses to yield it to the company, it may acquire the right to burn the building or to cast upon the owner the duty of protecting it against

fire, and it is no contract for permission to do a wrong but to exercise a right. A man may sell to another the right to burn or destroy his building, but he can not sell the right to kill or wrongfully injure him any more than he can sell himself into slavery. A carrier can not acquire the right to be negligent so as to injure a passenger, nor can an employer so as to injure his employes. A manufacturer may not contract with his factory girls that he shall not be held liable if they are injured by his failure to provide fire escapes as required by law.

In elucidating this the Court say that a contract by a railroad company with its employes stipulating for release from liability for negligence is void because it is an attempt to escape from the duty which the law imposes upon it.

"To exercise ordinary care to furnish them with a reasonably safe place to render their services and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interest because it endangers the life and limbs of citizens, which are of the highest value to the state and nation. A contract which exempts it from negligence in the discharge of these duties is void because it relieves it of an absolute duty which the law imposes upon it and because it unreasonably endangers the lives of employes."

But that a contract leasing a site for a building and stipulating for immunity for negligently firing the building does not relieve it from the discharge of any duty to the public or *to any citizen* that the law imposes upon it.

We find nothing in the opinion of this Court recently delivered in this case at variance with these views.

The same rule applies to such contracts by employers other than railroad companies. In *Roessner* v. *Herman*, 8 Fed. Rep., 782, the Court (Judge Gresham) held:

"The substance of the complaint is that defendant's machinery was defective and unsafe; that while operating the same, with reasonable care and without knowledge of its defective character, the deceased received injuries which caused his death, and that the defendant knew of the character of the machinery, or, with proper diligence, might have known it. So far as he could do so by the exercise of reasonable care, the defendant was bound to supply his factory with suitable and safe machinery. If he failed to do this and required his employe to operate machinery which

was unsound and unsafe, and in doing so the latter, while exercising ordinary care and prudence, received injuries which caused his death, his personal representative has the right of action for the benefit of those who have sustained losses from the injury and death. When the defendant's negligence in supplying his employes with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say, as in effect he does say in this answer: 'It is true that my machinery was defective and unsafe and my negligence caused the death of my employe, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employe which secured me the right to supply with defective and unsafe machinery and to be negligent.' Such a contract is void as against public policy. If there was no negligence, the defendant needed no contract to exempt him from liability. If he was negligent the contract set out in his answer would be of no avail."

In *Miller* v. *R. R. Co.*, 65 Fed. Rep., 305 (affirmed, 76 Fed. Rep., 440), the Court say, p. 308:

"It was long ago wisely held that an employer can not relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action."

The agreement pleaded in the case at bar is the equivalent of a consent on the part of the messenger that the railway company may unlawfully wound him or destroy his life. Such a consent is no bar to his action.

In *Barholt* v. *Wright*, 45 O. S., 177, an action to recover damages for personal injuries inflicted upon plaintiff in a fight, the defense was that the parties fought by consent. The Court say, p. 179:

"As often as the question has been presented it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat as well as in a combat when the plaintiff was the first assailant and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace, *as well as to the life and person of the citizen.* From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten than it does an agreement to part with his liberty and to become the slave of another."

In *Miller* v. *Bayer*, 94 Wisc., 123, it was held that consent on the part of a female to the commission of the crime of abortion upon her is no bar to civil action by her to recover damages for personal injuries inflicted upon her by the abortion.

Suppose an apothecary agreed to allow certain of his customers a discount on all purchases if they would release him from liability for negligence, could he in a civil action for carelessly poisoning one of them plead such a contract for release?

Counsel have argued that this rule is at variance with the doctrine of assumption of risk, where a servant who knowingly uses a dangerous appliance as a part of his contract of employment is held to agree that his master shall not be liable for an injury inflicted thereby. But an examination of the principle upon which this doctrine rests shows that it is not a contract against liability for negligence, for the master is not guilty of negligence in not providing a different appliance, if the servant, with full knowledge and without complaint, consents to use the appliance provided.

Narramore v. R*y. Co.*, 96 Fed. Rep., 298.

So far as we have been able to ascertain there is no case in which a contract stipulating for immunity in negligently causing personal injury or death has ever been upheld. In some states, it is true, a party may contract for exemption from liability, not for his personal negligence, but for that of his employes. In the case at bar the negligence charged related to the personal duty of the company and its breach was manslaughter under the laws of Ohio, where the accident occurred. To contend for the validity of the contracts of release pleaded here is to claim that immunity in committing a crime may be contracted for and that such a contract will be recognized and enforced in a court of law.

In *Pope Co.* v. *Gormully*, 144 U. S., 224, 233, the Court say:

"There are certain fundamental rights which no man can barter away, such for instance as his right to life and personal freedom."

In that case mere property rights were involved. In the case at bar the right to redress for personal injury and death itself is the subject matter of the contract which plaintiff in error seeks

to enforce, as well as the right of a passenger to safely travel the public highway by the public conveyance.

Laying aside for the moment the latter right we submit that it is well established that the public policy of Ohio renders void a contract stipulating for immunity in or implying assent to injury affecting the life or health of the citizen. So that even if the contract in the case at bar were to be treated as a contract for private carriage, and therefore involving no question of general mercantile law, it would still be obnoxious to the public policy of Ohio, which invalidates such contract, not on commercial principles, but as attempts to buy and sell the right of the citizen to personal safety. While some of the Ohio cases to this effect are common carrier cases, yet the principle of public policy which the Court invoke is that of the interest of the state in the life and personal safety of the citizen.

R. R. v. *Spangler*, 44 O. S., 471.
Barholt v. *Wright*, 45 O. S., 177.

In *R. R. Co.* v. *Curran*, 19 O. S., 1, the Court say :

"It is true, that common carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry ; but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods, applies with still greater force in the case of passengers.

"The *common law has a peculiar regard for human life ; and for this reason* exacts a greater degree of care in respect to it than in relation to any matter of mere property.

"Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care.

"This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers.

"In the case of the *Philadelphia & Reading Railroad Company* v. *Derby* (14 How. R., 486), it was laid down that, 'when carriers

undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety, require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross." And in delivering the opinion in the case of the steamboat *New World et al* v. *King* (16 How. R., 474), Mr. Justice Curtis declared that the Court desired to be understood as reaffirming "that doctrine, as resting, not only on public policy, but on sound principles of law.'"

As was said by Mr. Justice Woodbury, in *New Jersey Steam. Co.* v. *Bank*, 6 How., 427, in considering an immunity claimed under a similar contract between an express company and a subordinate carrier:

"It is imperative in cases of vessels devoted to both freight and passengers to hold the owners and their servants responsible for the exercise of every kind of diligence, watchfulness and skill which the principles of law may warrant. . . . . To relax the legal obligations and duties where such neglect, followed by death, is a crime and punishable at least as manslaughter, would be unfaithfulness to the spirit of such legislation and to the loudest demands of public policy."

All of which is respecffully submitted.

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APPENDIX.

Opinion of Judge William H. Taft, C. J.

United States Circuit Court, Southern District of Ohio, Western Division.

William Voigt vs B. & O. S. W. Ry. Co.

TAFT, Circuit Judge.

It seems to be well settled that an express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire.

Fordyce v. Jackson, 56 Ark., 594; Blair v. R. R. Co., 66 N. Y., 313; Brewer v. R. R. Co., 124 N. Y., 59; Kenney v. R. R. Co., 125 N. Y., 422; Woodworth v. R. R. Co., 26 O. S., 585; Thomas v. R. R. Co., 79 Ky., 169; Jones v. R. R. Co., 125 Mo., 666; Jennings v. R. R. Co., 38 U. C., Q. B., 15 Ont. App., 477; Yeomans v. Co., 44 Cal., 71; Ketcham v. R. R. Co., 133 Ind., 346; Chamberlain v. R. R. Co., 11 Wisc, 238; R. R. Co. v. Wilson, 79 Texas, 371.

Postal clerks whose relation to the railroad company is analogous to that of the express messenger are also accorded the same rights as passengers for hire.

Seybolt v. R. R. Co., 95 N. Y., 562; Nolton v. R. R. Co., 15 N. Y., 444; Magoffin v. R. R. Co., 102 Mo., 540; Mellor v. R. R. Co., 105 Mo., 455, 460; Jones v. Ry. Co., 125 Mo., 666; Hammond v. R. R. Co., 6 S. C., 170; Libbey v. R. R. Co., 85 Maine, 34; Kingman v. R. R. Co. (Ky.), 35 S. W., 264; B. & O. R. R. v. State, 72 Md., 36; Gulf Ry. Co. v. Wilson, 79 Texas, 371; Ketcham v. R. R. Co., 133 Ind., 346; Ry. Co. v. Shott (Va.), 22 N. E., 811; Collett v. R. R. Co., 16 Ad. & E. E. S., 984; Arrowsmith v. R. R. Co., 57 Fed. Rep., 165; Gleason v. R. R. Co., 140 U. S., 435.

A passenger for hire is entitled to the highest degree of care and skill from the railroad company in the management of its trains and the preservation of his safety. If the plaintiff was a passenger for hire, then a stipulation by the common carrier whose passenger he was exempting the carrier from responsibility for negligence, or that of its servants, was void according to the unbroken line of authorities in the Supreme Court of the United States.

R. R. Co. v. Lockwood, 17 Wall., 359; Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S., 397; Inman v. South Carolina Ry. Co., 129 U. S., 128–139; Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S., 312–322; Hart v. Pa. R. R., 112 U. S., 331–338; Ry. Co. v. Stevens, 95 U. S., 655; Bank of Ky. v. Adams Express Co., 93 U. S., 174–183; R. R. Co. v. Pratt, 22 Wall., 123, 124; Express Co. v. Caldwell, 21 Wall., 264–268.

In the case at bar, according to the averments of the answer now under consideration, the express company guaranteed the railroad company against any damage to it arising from suits for personal injury by the employes of the express company. By contract between the express company and the plaintiff, the plaintiff agreed to release all right of action which he might have against the railroad company for negligence, and stipulated that his agreement with the express company should enure to the benefit of the railroad company. These two contracts are in effect the same as a contract made directly with the railroad company by the messenger, whereby he agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants. In so far as they have this effect they are void because against public policy. Railroad Company v. Lockwood, 17 Wall., 359. They do not therefore constitute a valid defense to the action of the plaintiff to recover damages for injuries caused by the negligence of the defendant company.

The argument of defendant's counsel against the demurrer may be stated thus: The rule of public policy which renders invalid a stipulation by a common carrier restricting its liability for loss caused by its negligence or that of its servants, applies only to those duties which it is bound to perform as a common carrier.

Whenever that which it engages to do is something which it is not under obligation as a common carrier to do, it has the same freedom of contract as a private carrier for hire, and may therefore exempt itself by stipulation from liability for its own negligence or that of its servants. In the case at bar the defendant company was not under any common law obligation to furnish express facilities to the express company, whose employe the plaintiff was If, then, the express business is not performed by the railroad company as a common carrier, but under special contract, it must be done by it as a private carrier. Hence, the conclusion is said to follow that the messenger was carried by the railroad company as a private carrier under a special contract with the express company, under which the railroad company might lawfully exempt itself from liability arising from negligence of itself or that of its servants. The argument of counsel is sustained by the decision of the Supreme Court of Indiana in the case of Railway Co. v. Keefer, decided in October, 1896, and reported in 44 N. E. Rep., 796. The facts of that case are not to be distinguished from the one presented on this demurrer. With deference to that Court, I find it impossible to follow the reasoning upon which this conclusion is based. It is based upon distinctions supposed to be established by the Supreme Court of the United States in the Express Cases, 117 U. S. 1.

The cases cited in the beginning of this opinion clearly establishes the fact that the relation between the railroad company and the express messenger, where there is no contract exempting the railroad company from liability, is that of a public carrier to a passenger for hire. The Supreme Court of the United States, in the Express Cases in 117 U. S., page 1, did not decide that the express business was not the business of a common carrier. The plain intimation of the opinion of the Court was, that the express business had become such a necessity that it was the duty of a railroad company to furnish express facilities to the public; but the point in judgment was, that a railroad company was not obliged to furnish to an independent express company means for carrying on the express business upon its road. The Court held that the railroad company was not a common carrier of common carriers, and that it sufficiently complied with any obligation

which it was under to the public to furnish to them express facilities if it made a contract with one company to do all the express business upon its road. It follows from that case, that if a railroad company chooses to do its own express business, it may exclude all express companies from its line. The case does not decide that the railroad company, when it contracts to transport the express matter of an express company, is not discharging its duty as a common carrier in offering the public express facilities. It is true that it is under no obligation to carry an express messenger as such. It may stipulate with the express company that it will provide one of its own servants to take charge of the express matter while upon its trains. But when it does carry an express messenger, it is discharging its functions as a common carrier of persons. An express messenger is not a different kind of freight from an ordinary passenger upon its passenger train, except that he travels in a special car provided by the railroad company. He would have the right to demand of the railroad company that he should be carried in the passenger train if he tendered his fare.

If the company, in order to discharge its duty to the public to afford express facilities upon its line, agrees to carry him in a special car in a passenger train, he does not thereby lose his rights and character as a passenger. This may be seen from the ruling of the Supreme Court in an analogous case. A railroad company is a common carrier of cattle. It is under no obligation to carry drovers to attend to the cattle. It may assume this duty itself and provide servants of its own to water and care for the live freight. When it does, however, make a contract allowing a drover to ride upon its cattle train, furnishing, as one of the terms of the contract of affreightment, free transportation for the purpose, he is carried as a passenger for hire by the railroad company, and as a common carrier. The reason is, that the railroad company is bound to carry the drover if he presents himself and pays his fare upon its passenger trains, and if, for any purpose of its own, the railroad company sees fit to allow the drover to ride upon its freight trains, though it is not under any obligation to carry him upon such trains, in doing so it does not lose the character of a common carrier carrying a passenger for hire.

Railroad Company v. Lockwood, 17 Wall., 359. A common carrier is allowed to make any reasonable stipulation restricting its liability to a shipper or to a passenger, and in this wise it may cut down its liability to exactly that to which a private carrier for hire would be subject, but this does not make the common carrier a private carrier, so as to escape the rule of public policy, which forbids the common carrier from stipulating against liability for its own negligence.

If, then, a railroad company, in carrying an express messenger for an express company, is a common or public carrier of a passenger for hire, the railroad company can not by restricting its liability for injury to the messenger, change its character as a common carrier.

In R. R. Co. v. Lockwood, Mr. Justice Bradley, in delivering the opinion of the Supreme Court, used this language:

"It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or persons on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee, because he has made the contract.

"We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if, by special agreement, the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of

inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

"On this point there are several authorities which support our view, some of which are noted in the margin.

"A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

It is quite true that the railroad company is not obliged to furnish a special car for the express messenger, but when it does so, then it assumes the relation of a common carrier to the messenger carried, because he is one of the public whom the railroad company is bound to carry in some kind of a car. There is no such difference in the risk of carrying the express messenger and the ordinary passenger in the same train, as there is between the risk to the owner of a truck boat in carrying a keg of specie or a load of expensive furniture, and that involved in carrying the produce which he holds himself out to transport.

In Bates v. R. R. Co., 140 Mass., 255, it was held that an express messenger who was riding on a ticket in the baggage car, providing that in consideration of being allowed to ride in the baggage car, the messenger would assume all risks or accident and injuries received by him while so riding was a valid contract exempting the railroad company from an injury received by the messenger through the negligence of the company, and a similar ruling was made in the case of Hosmer v. R. R. Co., 156 Mass., 506. The conclusion of the Court was based on the fact that the

place where the plaintiff was riding was one in which the defendant was not under obligation to carry him. The contract gave him the privilege, which he sought for his own convenience. I think that the Bates case and the Hosmer case are not in accord with the decisions of the Supreme Court of the United States. First, the contracts did not expressly exempt the railroad company from accidents occurring through its own negligence, and yet they were given that effect, which is in conflict with the decision of the Supreme Court in the case of the N. J. Steam Navigation Co. v. The Merchants' Bank, 6 How., 383. Secondly, the cases can not be reconciled with the decision in R. R. Co. v. Lockwood, in which the plaintiff was a drover allowed to ride upon a freight train, a much more dangerous place than the passenger train, to which the railway company might have compelled him to resort had it seen fit to do so, and yet he was still treated as a passenger for hire, who, on grounds of public policy, was not permitted to barter away his right to the highest care and skill of the railway company in his transportation.

There is a class of cases upon which defendant's counsel rely, known as circus cases, the first of which is Coup v. Ry. Co., 66 Mich., 111. This is followed in R. R. Co. v. Wallace, 14 C. C. A., 257, and Robertson v. Ry. Co., 156 Mass., 525. In these cases the contract of the railroad company was with a circus proprietor, by which the railroad company agreed to haul with its locomotive power over its road the train of cars belonging to the circus proprietor and containing the animals and the company of persons engaged in the circus. It was held that the railway company might exempt itself from liability for the negligence of itself and its servants in the hauling of the circus train. Without deciding that, under the rules of public policy enforced in the Federal courts, such a contract could be held valid, it is sufficient to say that the cases are clearly distinguishable from the one at bar. In those cases, the contract of the railway company was not one of carriage ; it was merely one of hauling or towing cars by the locomotives of the railway company. The freight and passengers were not entrusted to the railway company in the manner in which the merchandise and passengers received by a common carrier are entrusted to it. Transportation

Line v. Hope, 95 U. S., 297–300; Bank of Kentucky v. Adams Express Company, 93 U. S., 174–184. The railway company might refuse absolutely to receive the cars of the circus company and to haul them. The railway company did not hold itself out as engaging in the business of hauling or towing.

The demurrer to the second defense of the answer is sustained and the case will stand for trial on the issues made by the other defenses.